

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**





UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

2297

74-2297

TOYOMENKA, INC.,

Plaintiff-Appellant,

-against-

S. S. "TOSAHARU MARU", her engines,  
boilers, etc.

-and against-

YAMASHITA-SHINNIHON STEAMSHIP CO.,  
LTD., d/b/a Y. S. LINE,

Defendant and Third  
Party Plaintiff-Cross  
Appellant

-against-

INTERNATIONAL TERMINAL OPERATING CO.,  
INC., and McROBERTS PROTECTIVE AGENCY,  
INC.,

Third-Party Defendant  
and Cross Appellant

-----  
MARUBENI-IIDA (AMERICA), INC. and  
MURILSPUN, LTD.,

Plaintiffs-Appellants,

-against-

S. S. "TOSAHARU MARU", her engines,  
boilers, etc.,

-and against-

YAMASHITA-SHINNIHON KISEN K.K.,  
YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.  
and TEXAS TRANSPORT & TERMINAL CO., INC.

Defendant and Third  
Party Plaintiff-Cross  
Appellants

(COVER PAGE 1)

-against-

INTERNATIONAL TERMINAL OPERATING CO., INC.,  
and McROBERTS PROTECTIVE AGENCY, INC.,

Third-Party Defendant-  
Appellee

---

BRIEF AND APPENDIX FOR APPELLANT

On Appeal from Order of the United States  
District Court for the Southern District  
of New York

---

VINCENT, BERG & RUSSO  
Attorneys for Plaintiff-  
Appellant  
Toyomenka, Inc.  
Office & Post Office Address  
127 John Street  
New York, New York 10038  
Telephone: 344-2083

HILL, RIVKIN, CAREY  
LOESBERG & O'BRIEN  
Attorneys for Plaintiffs-  
Appellants  
Marubeni-Iida (America),  
Inc. and Murilspun Ltd.  
Office & Post Office Address  
96 Fulton Street  
New York, New York 10038  
Telephone: 233-6171

CARMEN A. RUSSO  
LEO A. CAPPELLETTI  
MARTIN B. MULROY,  
Of Counsel

(COVER PAGE 2)



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BRIEF OF PLAINTIFFS-APPELLANTS

Statement of the Case  
and Facts

The S.S. TOSAHARU MARU, arrived at Pier 6, Brooklyn, on or about July 27, 1970, from Japan with cargo consigned to plaintiffs-appellants under ocean bills of lading which included the provision:

"37. Liability of Stevedores and Others. Without prejudice to any other provision hereof it is hereby expressly agreed that all servants, agents and independent contractors (including in particular, but not by way of limitation any stevedores) used or employed by the Carrier for the purpose of or in connection with the performance of any of the Carriers obligations under this Bill of Lading shall in consideration of their agreement to be so used or employed have the benefit of all rights defences, exceptions from or limitations of liability or immunities of whatsoever nature referred to or incorporated herein applicable to the carrier or to which the Carrier is entitled hereunder so that in no circumstances shall any such servants, agent or independent contractor be under any liability greater than that of the carrier hereunder. It is hereby further expressly agreed that for the purpose of the foregoing provision the Carrier is or shall be deemed to be acting as agent or trustee on behalf and for the benefit of all persons who are or may be its servants, agents or independent contractors from time to time for the purpose of or in connection with the performance of any of Carriers obligations under this Bill of Lading, and that all such persons shall to this extent be or be deemed to be parties to the contract contained in or evidenced by this Bill of Lading."



The steamship company that issued the bills of lading containing this clause, in addition to entering into this contract with the shippers engaged International Terminal Operating Co., Inc., (I.T.O.) to discharge and load cargo including the incidental storage of cargo at its pier and shed facility until delivery of same could be made to the proper parties. (31a paras 6 & 7).

There was no contract entered into between this steamship company and McRoberts Protective Agency, Inc., (hereinafter McRoberts), but it was actually I.T.O. who in turn contracted with McRoberts to provide protective service. (31a para 8).

On August 1, 1970, after the cargo consigned to New York was completely unloaded and stored in a pier shed, that cargo giving rise to this suit was discovered to be missing. The Trial Court attributed this loss to deficient guarding services inside the pier shed by McRoberts. (8a) Judgment was entered against McRoberts by the Trial Court with the conclusion that McRoberts is entitled to the \$500-per-package limitation. (7a).

The Decision Below

The District Court, upon the opinion of Honorable Kevin Thomas Duffy dated August 7, 1974, recognized and the appellants do not here contest the right of parties to a bill of lading to extend by contract the limitation of liability of \$500-per-package as set forth in the Carriage of Goods by Sea Act [46 U.S.C.A. § 1304 (5)] to others who are not included in the Statute.\* Neither do the parties contest the finding of the Trial Court that the stevedore, in this case I.T.O., has the benefit of the limitation of liability, because as the District Court states "its liability is expressly limited by the Bill of Lading."

The Court, completely obliterating the legal distinctions between employees, agents and independent contractors stated that McRoberts, by analogy, should have the benefit of the limitation that I.T.O. had, because McRoberts is an independent contractor of I.T.O.

\* 46 U.S.C.A. § 1301 (e) provides: "The term 'carriage of goods' covers the period from the time when the goods are loaded on to the time when the goods are discharged from the ship". Since it is undisputed that the goods in the case at bar were lost well after "discharge from the ship" C.O.G.S.A. was not applicable as an Act of Congress. C.O.G.S.A.'s \$500 per package limitation was merely incorporated by reference and derived its sole vitality from the expressed intention of the parties who could no more expand the coverage of an Act of Congress than amend the Constitution of the United States.



Accordingly, the Court below erred in that McRoberts was not one of the persons included in the contract between the steamship company and cargo owner, and the right to otherwise diffuse the limitation was not included in Clause 37 of the bill of lading contract.

POINT I

THE TRIAL COURT ERRED IN  
EXTENDING THE TERMS OF BILL  
OF LADING CLAUSE 37 TO A  
PARTY NOT SPECIFICALLY REFERRED  
TO WITHIN THE CLAUSE.

The services performed by McRoberts were clearly pursuant to an agreement to which neither the cargo owners, nor the steamship company was a party.  
(44 A para 8)

The language of Clause 37 of the Bill of Lading clearly indicated that all servants, agents and independent contractors employed by the steamship company shall have the limitations of liability. In Toyomenka, Inc. v. Toko Kaiun Kabushiki Kaisha, 342 F. Supp. 292 (S.D. Tex. 1972) the Court reviewed the theory of third-party beneficiary type contracts in the light of the RESTATEMENT and noted: "The significance of classifications of beneficiaries is that certain rights and privileges have been accorded to certain classes of beneficiaries".

The leading case supporting the granting of limitations of liability to stevedores was A.M. Collins & Co. v. Panama R. R., 197 F.2d 893, cert. denied 344 U.S. 875 (1952). However, Judge Holmes in his dissenting opinion, at page 898, stated:



"The right of the ship or carrier to limit its liability for negligence to an amount not exceeding \$500 is in derogation of the common law and must be strictly construed. It does not shield an employee, not a party to the bill of lading, who (for instance) negligently sets fire to or otherwise negligently injures the cargo. No ship, carrier, or party to the bill of lading, is being sued in this case, but only the corporate stevedore, which is primarily liable under the decision of Reid v. Fargo, 241 U.S. 544, 36 S. Ct. 712, 60 L. Ed. 1156.\*\*\*

" \* \* \*The appellee owed a duty to the public to keep its stevedoring equipment in a safe condition; the answer admits that it did not do so. Where an agent violates a duty that he owes to a third-party, he is personally liable to the latter, not by reason of his agency, but upon the ground that he has failed in his common law obligation not to injure another.\*\*\*

" 'The liability of an agent for his own negligence has long been embedded in the law.' Brady v. Roosevelt S.S. Co., 317 U.S. 575, 580, 63 S. Ct. 425, 428, 87 L. Ed. 471.\*\*\*

"The bill of lading in this case limited the carrier's liability in question to \$500, but did not confer upon the carrier the power to diffuse partial dispensations to its negligent stevedores or other agents for their wrongful acts."

The Fourth Circuit Court of Appeals in Robert C. Herd & Co. v. Krawill Machinery Corp., at 256 F. 2d 946, after stating that the immunity conferred by the Act and the bill of lading is personal to the ship and its owner went on to state:

"If there were a contrary intent, nothing would have been easier than to say in the statute or in the bill of lading that the limitation applies to the ship, its owners and loading agents\*\*\*"

The origins of the doctrine whereby a non-party to a contract can claim rights under that contract as McRoberts here attempts brings us back to the opinion of the N.Y. Appellate Division in Seaver v. Ransom, 168 N.Y.S. 454 (App. Div.1917) at page 459, where it was stated:

"We conclude therefore that in order to have the benefit of such a contract it should appear from the contract that it was made for the benefit of the plaintiff [i.e., the third-party beneficiary] and that there must be some equitable or moral duty from the contractee to the plaintiff".

Nothing from the language of the bill of lading can support a claim that Clause 37 was made for the benefit of McRoberts and no such finding was made by the District Court. In Herd v. KraVill Machinery, 359 U.S. 297<sup>(1959)</sup>, the Supreme Court stated:

"\*\*\* Similarly, contracts purporting to grant immunity from, or limitation of liability must be strictly construed and limited to intended beneficiaries, for they are not to be applied to alter familiar rules visiting liability upon a tort-feasor for the consequences of his negligence, unless the clarity of the language used expresses such to be understanding of, the contracting parties. Boston Metals Co. v. The Winding Gulf, 349 U.S. 122, 123-124."



Not only does the Bill of Lading Clause 37 not purport to grant a limitation of liability to McRoberts but the Court will note that in the McRoberts contract with I.T.O., I.T. O. did not purport to extend to McRoberts the personal limitation of liability which it received by virtue of the ocean bill of lading clause.

Accordingly, McRoberts can claim no rights from the bill of lading.

POINT II .

THE COURT BELOW ERRED IN  
EXTENDING THE BENEFITS OF A  
CONTRACT TO ONE WITHOUT  
PRIVITY OR THIRD PARTY  
BENEFICIARY STATUS

Only the parties to a contract may enforce contract provisions. U.S. v. Voges, (E.D.N.Y.-1954) 124 F. Supp. 543. A sub-contractor such as McRoberts is not a third-party-beneficiary of the contract between the steamship company and cargo owners, unless the contract clearly states that the sub-contractors are to be included. If not so stated they are mere incidental beneficiarys. Cerp Construction Co. v. J.J. Clery, Inc., 299 N.Y.S. 2d 560, affirmed 298 N.Y.S. 2d 469.

The Opinion below suggests that the District Court was of the view that employees and agents of the stevedore have the protection of their principals. However, the case cited for the proposition, Carle & Montanari, Inc. v. American Export Isbrantsten Lines, Inc., 275 F. Supp. 76 (S.D.N.Y.), aff'd 386 F. 2d 839 (2d Cir. 1967), cert. denied 390 U.S. 1013 (1969), is not authority for the proposition stated because the holding of that case was that the parties to the bill of lading expressed the intention in Clause 17 and Clause 2 of that bill of lading



to include the various persons as those to whom limited liability has been extended. The case would have no meaning had the limitation been applicable to stevedores simply because they are contractors engaged by carriers. In the Herd case, supra, the Supreme Court observed (P.302):

"looking to the limitation-of-liability provisions of the bill of lading, we see that they, like Sec. 1304 (5) of the Act and its legislative history, do not advert to stevedores or agents. Instead they deal only with the 'Carrier's liability' to the shippers. They say that 'the Carrier's liability, if any, shall be determined on the basis of \$500 per package.' There is, thus, nothing in those provisions to indicate that the contracting parties intended to limit the liability of stevedores or other agents of the carrier for damages [caused by their negligence] If such had been a purpose of the contracting parties it must be presumed that they would in some way have expressed it in the contract."

From the language it is clear that independent contractors do not have the limitation of liability afforded to their principals which is precisely what the District Court held in this case.

Even the premise for the Court's erroneous analogy is without merit where the Court asserted that agents of the stevedore have such protection. In the same Herd opinion the Supreme Court said (pp. 304-305).

"In Brady v. Roosevelt S.S. Co., 317 U.S. at 580-581, this Court said that 'The liability of an agent for his own negligence has long been embedded in the law,' that 'withdrawal of the right to sue the agent for his torts would result at times in a substantial dilution of the rights of claimants,' and that withdrawal of that right would be 'such a basic change in one of the fundamentals of the law of agency [as] should hardly be left to conjecture.' This Court has several times held that an agent's only shield from liability 'for conduct harmful to the plaintiff \*\*\*is a constitutional rule of law that exonerates him.' Sloan Shipyards Corp. v. Emergency Fleet Corp., 258 U.S., at 567; Brady v. Roosevelt S.S. Co., 317 U.S., at 584. Any such rule of law, being in derogation of the common law, must be strictly construed, for '[n]o statute is to be construed as altering the common law farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express.' Shaw v. Railroad Co., 101 U.S. 557, 565; see Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 437."

The basic legal responsibility of a stevedore in relation to his liability as a tortfeasor for damage to goods was the subject of consideration by the High Court of Australia, in Wilson v. Darling Island Stevedoring & Lighterage Co., (1956), 1 Lloyd's List L.R. 246. The views of that Court were quoted, with approval, by the Supreme Court in Herd & Co. v. Krawill Machinery Corp., supra, as follows (p.308):



"The stevedore is a complete stranger to the contract of carriage, and it is no concern of his whether there is a bill of lading or not, or, if there is, what are its terms. He is engaged by the shipowner and by nobody else, and the terms on which he handles the goods are to be found in his contract with the shipowner and nowhere else. The shipowner has no authority whatever to bind the shipper or consignee of cargo by contract with the stevedore, and there is, in my opinion, no principle of law-- deducible from the Elder Dempster Case or from any other case - which compels the inference of any contract between the shipper or consignee and the stevedore. If the stevedore negligently soaks cargo with water and ruins it, I can find neither rule of law nor contract to save him from the normal consequences of his tort."

In Cabot Corp. v. S.S. Mormacscan 235 F. Supp. 845 (S.D.N.Y. 1964), the District Court held that when parties intend to extend a benefit to someone who is not a party to the contract they can do so by clearly expressing their intention in the contract in so many words. This Court affirmed the decision (441 F. 2d 476) pointing out that in Carle & Montanari, Inc. v. American Export Isbrandsten Lines, Inc. (supra) cited by the District Court in the instant action the bill of lading included the language "all agents and all stevedores." 275 F. Supp. at p. 78. This Court concluded:

"We will 'not stretch the language when the party drafting such a form contract has not included a provision it easily might have.' The Monrosa v. Carbon Black Export, Inc. 359 U.S. 180, 183 (1959)."

The District Court here did not stretch the language but made a new contract based on an analogy that is not supported by law.

CONCLUSION

THE DISTRICT COURT DECISION SHOULD  
BE REVERSED TO THE EXTENT THAT IT  
PERMITS MCROBERTS TO LIMIT ITS  
LIABILITY TO \$500 PER PACKAGE.

Respectfully submitted,

VINCENT, BERG & RUSSO  
Attorneys for Plaintiffs-Appellants,  
Toyomenka, Inc.  
127 John Street  
New York, New York 10038

HILL, RIVKINS, CAREY, LOESBERG & O'BRIEN  
Attorneys for Plaintiffs-Appellants  
Marubeni-Iida (America), Inc. and  
Murilspun, Ltd.  
96 Fulton Street  
New York, New York 10038

CARMEN A. RUSSO  
STEPHEN A. FRANK  
LEO P. CAPPELLETTI  
MARTIN B. MULROY

Of Counsel



DOCKET ENTRIES

CIVIL DOCKET

UNITED STATES DISTRICT COURT

IN ADMIRALTY 3-30-73 Action consolidated with 71 C. 121  
for all purposes. Noeley, JUDGE GURFEIN

Jury demand date: 71 CIV. 656

JUDGE DUFFY

JUDGE DUFFY

Form No. 104 Rev.

## TITLE OF CASE

TOYOMENKA, INC.

AGAINST

S.S. "TOSAHARU MARU", her engines, boilers, etc.

AND AGAINST:

YAMASHITA-SHINNIHON STEAMSHIP CO. LTD.,

d/b/a Y.S. LINE (Deft-3rd pty plfff)

7/16/73 INTERNATIONAL TERMINAL OPERATING CO. INC.

3rd Pty. Deft.

McROBERTS PROTECTIVE AGENCY INC.

(3rd pty defts)

For plaintiff:

VINCENT &amp; BERG &amp; RUSSO

15 William St.

N.Y.C.N.Y. 10005

For defendant:

Kirlin Campbell &amp; Keating

120 Broadway NY 10005 732-5520

Mill, Betts & Nash 26 B'way NYC 10005  
(International terminal.)

J. Robert Morris

111 Fulton St. N.Y., N.Y. 10005

732-5627 (McRoberts Protective  
Agency, ) Inc.

## STATISTICAL RECORD

## COSTS

## DATE

NAME OR  
RECEIPT NO.

## REC.

J.S. 5 mailed

X

Clerk

2-16-71 LINCOLN F&amp;B

15

2-19-71 U.S. TREAS

16

J.S. 6 mailed

✓

Marshal

10/8/74 Kipley

5

10/14/74 Kipley

5

10/17/74 Kipley

10

Basis of Action:

Docket fee

DAMAGE TO CARGO

DOO

Witness fees

Action arose at:

Depositions



(Pg. #2)

71 CIV. 656

DATE	PROCEEDINGS	Date Order Judgment No
Feb 16-71	Filed Complaint. Issued Summons.	
Mar 12-71	Filed summons with marshal's ret. Served Yamashita Shinnihon Steamship Co. Ltd. c/o Texas Transport & Terminal Co. Inc. by Mr. Mantandreci on 2-25-71	
Mar 16-71	Filed ANSWER of Yamashita-Shinnihon S.S.Co.Ltd. to complaint.	
Mar 16-71	Filed third party complaint and issued 3rd pty. summons.	KC&K
Mar 22-71	Filed third party summons with marshal's ret. Served International Terminal Operating Co.Inc. by A.K. Erly, V.P. on 7/19/71.	
Mar 29-72	Filed Order permitting deft. Yamashita-Shinnihon Steamship Co.Ltd. to serve and file an amended 3rd pty. complaint. Brisant, J.(mailed notice).	
Apr 6-72	Filed Amended THIRD PARTY COMPLAINT. - Issued summons.	
Apr 17-72	Filed Pltff's notice to take deposition of Int'l Terminal Operating Co Inc.	
Apr 19-72	Filed 3rd pty deft. Int'l Terminal Operating Co Inc. answer to amended 3rd pty complaint and Cross-claim vs. 3rd pty deft McRoberts Protective Agency Inc.	HRH
Apr 30-72	Filed Deft-3rd pty pltff's stipulation that time of 3rd pty deft McROBERTS PROTECTIVE AGENCY INC. to appear, serve & file its answer is ext. to Aug. 28, 1972. So Ordered- Gurfein J.	
May 11-72	Filed 3rd pty summons & entered Marshal's ret --Served International Term. & Operating Co Ltd. 7-10-72; served McRoberts Protective Agency Inc. 7-10-72.	
May 30-72	Filed stip. and order that the time of the 3rd party deft. Mc Roberts Protective Agency,Inc. to answer is ext. from 8-30-72 to 9-30-72. Gurfein,J.	
May 29-72	Filed ANSWER of 3rd pty.deft.McRoberts Protective Agency,Inc. to cross-complaint.	JRM
May 29-72	Filed ANSWER to amended 3rd pty. complaint, withcross-complaint.	
May 25-72	Filed Notice of Deposition of 3rd pty. deft. McRoberts Protective Agency, Inc.	
May 12-72	Filed third party deftInternational Terminal Operating Co.,Inc.'s Answer to cross-claim of third pty deft McRoberts Protective Agency.	
May 15-72	Filed third party deft.'s notice to take deposition of pltff,defts, 3rd pty pltff & 3rd pty deft International Terminal Operating Co.Inc. on 1-10-73.	
May 30-73	Filed Memo-Endorsed on Pltff's complaint filed 3-23-71: All pretrial discovery in this case must be completed within 90 days from the date of this order, May 28,1973. There will be another pretrial conference on June 5,1973 at 4:30 P.M. at which time all parties are to appear with pretrial memorandums, & a proposed pretrial order or combined Pretrial order. So ordered. Motley,J. Mailed Notice.	
May 30-73	Filed 2nd endorsement on pltff's complaint filed 3-23-71: The within action should be consolidated with 71 Civ 656. So ordered. Motley, J.	
May 31-73	Filed consent and order that time of 3rd pty. deft. McRoberts Protective Agency to answer cross-claim is ext. from 5-1-73 to 5-21-73. So ordered, Duffy, J.	
May 25-73	Filed third pty. deft. Intl. Terminal Operating Co.,Inc. ANSWER to cross claim.	HB&N
May 29-73	Filed third pty. deft. answer(mc roberts protective agency) to third pty. cross complaint of third pty. deft. Intl.Terminal Operating Co.,Inc.	JRM
May 29-73	Filed third pty. deft. McRoberts Protective Agency ANSWER to third pty. complaint of third pty. pltff. Yamashita Shinnihon SS Co.	JRM
May 19-73	Filed Pre-trial order. DUFFY, J. (mn)	
May 16-73	PRE-TRIAL CONF. HELD BEFORE DUFFY, J.	
May 16-73	PRE-TRIAL CONF. HELD BEFORE DUFFY, J.	
May 30-73	Before DUFFY, J. non-jury trial begun and concluded. Decision reserved.	

(CONT'D - PAGE #3)

**DUFFY, J.**

7-10-74

DATE	FILINGS-PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS
Aug. 7-74	Filed memorandum of law on behalf of third-pty deft. McRoberts Protective Agency, Inc.	
Aug. 7-74	Filed post trial memorandum on behalf of pltffs.	
Aug. 7-74	Filed Opinion # 41072- I find that the claimover by Y.S. Lines against McRoberts is valid and the claimover against ITO must be dismissed. But the claimover also includes a claim for attys fees and disbursements. In the absence of a specific statutory provision, such an award lies within the discretion of the Court and as indicated. The pltffs. and the third-pty plttf having been accorded all that is due to them, I find it unnecessary to discuss the other claims of the various parties. Settle judgments on notice in accordance with this opinion. DUFFY, J. (m/n)	
Aug. 19-74	Filed third-pty deft. International Terminal Operating Co., Inc's notice of motion for an order for reconsideration of decision and opinion by Duffy, dated 8-7-74. Ret. 9-3-74	
Aug. 19-74	Filed deft. & third-pty plttf. Yamashita-Shinnihon Steamship Co., Ltd. petition and memorandum and notice of motion for an order for reconsideration of the portion of the opinion of Duffy, J. dated 8-7-74 (containing the court's findings and conclusions). Ret. 9-3-74	
Aug. 28-74	Filed Memorandum of Law on behalf of third-pty deft. McRoberts Protective Agency, Inc.	
Aug. 30-74	Filed Judgment # 74,713- ordered that plttf. Toyomenka, Inc. recover of the deft. Yamashita-Shinnihon Steamship Co., Ltd., d/b/a/ Y.S. Line, the sum of \$14,000.00 with interest and costs- that plttfs. Marubeni-Iida (America) Inc. and Murilspan Ltd. recover of the deft. Yamashita-Shinnihon Steamship Co., Ltd. the sum of \$7,500.00 with interest and costs- that deft. and third-pty plttf. Yamashita-Shinnihon Steamship Co., Ltd. d/b/a Y.S. Line recover of third-pty deft. McRoberts Protective Agency Inc the sum of \$21,000.00 with interest- and that the complaint of third-pty plttf. Yamashita-Shinnihon Steamship Co., Ltd. d/b/a Y.S. Line against thirdpty deft. International Operating Co., Inc. be dismissed without costs. DUFFY, J. Judgment entered 9-3-74. Clerk Ent. 9-4-74 (m/n)	
Sep17-74	Filed transcript of record of proceedings, dated, 7-10-74.	
Sep11-74	Filed memo endorsed on motion filed 8-19-74. Upon reconsideration, the original decision is reaffirmed. Duffy, J.	
Sep11-74	Filed memo endorsed on motion filed 8-19-74. Upon consideration the original decision is reaffirmed. Duffy, J.	

(CONT'D - PAGE # 4 - OVER)



(PAGE #4)

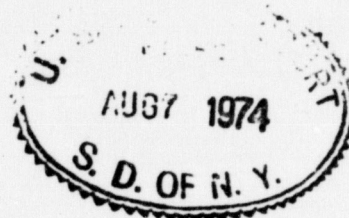
FILINGS - PROCEEDINGS

AMOUNT  
REPORTED IN  
EMOLUMENT  
RETURN

Oct. 8-74	Filed deft. and third -pty . plfff. Yamashita-Shinnihon Steamship Co., Ltd. notice of cross-appeal from so much of final judgment entered on 9-3-74 denied the portion of the claim of said deft and third-ty plfff. for indemnity damages. Copies mailed to: Vincent Berg & Russo- Hill Rivkins & Carey- J. Robert Morris and Hill Betts & Nash. Entered 10-9-74	
10-74	Filed third-pty deft. International Terminal Operating Co., Inc's cross-appeal from that part of the final judgment entered 9-3-74 and Duffy, J reaffirmance of his decision on reconsideration entered 9-11-74. Copies mailed to: J. Robert Morris- Vincent, Berg & Russo- Hill, Rivkins, Carey, etc. and Kirlin Campbell & Keating. Entered- 10-11-74.	
	Filed Transcript of record of proceedings, dated July 10-74 (ALSO FILED IN 7/CIV-1351).	
11-74	Filed stipulation designating exhibits to be transmitted to U.S.C.A.	
11-74	Filed notice that the record on appeal has been certified and transmitted to the USCA on 11-4-74	

COPY

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



-----X  
TOYOMENKA, INC.,  
Plaintiff,

-against-

S.S. "TOSAHARU MARU", her engines,  
boilers, etc.

-and against-

YAMASHITA-SHINNIHON STEAMSHIP CO.,  
LTD., d/b/a Y.S. LINE,  
Defendant and  
Third Party Plaintiff,

-against-

INTERNATIONAL TERMINAL OPERATING CO., INC.  
and McROBERTS PROTECTIVE AGENCY, INC.,  
Third Party Defendants.

#41072  
71 Civ. 656

-----X  
MARUBENI-IIDA (AMERICA), INC.  
and MURILSPUN LTD.,  
Plaintiffs,

-against-

S.S. "TOSAHARU MARU", her engines,  
boilers, etc.,

-and against-

YAMASHITA-SHINNIHON KISEN K.K.,  
YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.,  
and TEXAS TRANSPORT & TERMINAL CO., INC.,  
Defendants,

-and-

YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.,  
Third Party Plaintiff,

-against-

INTERNATIONAL TERMINAL OPERATING CO., INC.  
and McROBERTS PROTECTIVE AGENCY, INC.,  
Third Party Defendants.

OPINION

71 Civ. 1351

1a



**APPEARANCES:**

VINCENT & BERG & RUSSO, ESQS.  
Attorneys for Plaintiff Toyomenka, Inc.  
By Stephen A. Frank, Esq.  
Of Counsel

HILL, RIVKINS, WARBURTON, ESQS.  
Attorneys for Plaintiffs Marubeni-Iida (America), Inc.  
and Murilspun Ltd.  
By Leo P. Cappelletti, Esq.  
Of Counsel

KIRLIN, CAMPBELL & KEATING, ESQS.  
Attorneys for Yamashita-Shinnihon, Ltd.,  
Defendant and Third-Party Plaintiff  
By Harold V. Higham, Esq.  
Richard H. Sommer, Esq.  
Of Counsel

HILL, BETTS & NASH, ESQS.  
Attorneys for Third Party Defendant  
International Terminal Operating Co., Inc.  
By Michael J. Ryan, Esq.  
Of Counsel

J. ROBERT MORRIS, ESQ.  
Attorney for Third Party Defendant  
McRoberts Protective Agency, Inc.  
By Henry E. Gorayeb, Esq.  
Of Counsel

-----

KEVIN THOMAS DUFFY, D.J.

These two consolidated actions were tried to the Court sitting in admiralty, as both involve the loss of certain goods shipped on the S.S. Tosahura Maru which arrived from Japan at Pier 6, Brooklyn, on or about July 27, 1970. Plaintiff Toyomenka, Inc. (hereinafter "Toyomenka") asserts

a claim for the non-delivery of 12 cartons of woolen piece goods shipped under bill of lading YN-133, and 16 cartons of woolen piece goods shipped under bill of lading YN-134. Plaintiffs Marubeni-Iida (America), Inc. and Murilspun Ltd. (hereinafter collectively "Marubeni") claim non-delivery of 15 bales of woolen piece goods shipped under bill of lading KN-99.

Yamashita-Shinnihon Steamship Co., Ltd. (hereinafter "Y.S. Line") is the owner of the "Tosahura Maru" and contracted with the International Terminal Operating Co., Inc. (hereinafter "ITO") for the latter to discharge, take care, control, store, protect and deliver the goods consigned to New York on the Tosahura Maru, including the cartons and bales at issue in this action. ITO, in turn, contracted with McRoberts Protective Agency, Inc. (hereinafter "McRoberts") to provide guards and protective service at Pier 6.

It is undisputed that the bills of lading under which the cartons and bales at issue were shipped are subject to the Carriage of Goods by Sea Act (46 U.S.C. §1300 et seq.) and its liability limitations, not only by their terms but also by operation of law. It is also agreed that each of the cartons or bales constitutes a package within the meaning of the bills of lading and the Carriage of Goods by Sea Act.



In the pretrial order the plaintiffs amended their complaints to allege a direct liability to them because of the negligence of ITO and McRoberts. Y.S. Lines also asserts a claim for indemnity, including attorney's fees and disbursements against ITO and McRoberts. In turn, ITO asserts a similar claim for indemnity against McRoberts. McRoberts has cross-claimed against ITO.

ITO and McRoberts disclaim any liability and assert that even if liable they are entitled to the package limitation of COGSA. They further defend against the direct claim of the plaintiffs on the basis that it is barred by the Statute of Limitations and that this Court lacks jurisdiction over the subject matter of the suit.

All of these legal gyrations arise from a very simple set of facts. Plaintiffs were the owners of certain bales and cartons of piece goods shipped from Japan to Brooklyn. Forty-two out of the 43 bales and cartons were unloaded from the Tosahura Maru, but 1 carton under bill of lading KN-99 consigned to Marubeni was not unloaded. Y.S. Lines admits liability for the loss of this carton but urges that the COGSA \$500 limitation be applied to the loss. I agree that the limitation should so apply.

The other 42 cartons and bales were placed by ITO in the bale area of the shed on Pier 6. The bale area was

protected by a guard employee of McRoberts whose responsibility included making sure that the packages were taken out of the area only upon presentation of an order. McRoberts also supplied a guard on each of the two loading platforms where the trucks came to pick up merchandise on Pier 6. Two other McRoberts guards were also on the dock during working hours, one patrolling and the other stationed in the crib area. There was also a McRoberts guard at the gate outside the dock.

During non-working hours there was a McRoberts guard at the gate and another inside the locked pier.

On August 1, 1970, when the cargo consigned to New York was completely unloaded, the goods in question were discovered to be missing. The how and the wherefore of their disappearance remains a total mystery. It is clear, however, that on the days between the time that the Tosahura Maru arrived and the goods were discovered missing there were at least 40 longshoremen working on the dock and various and sundry truckmen coming to pick up goods at the loading platform on the dock.

The first question (and perhaps the most important one from an economic point of view) is whether ITO and McRoberts are entitled to the COGSA limitation of liability as expanded by the bills of lading. Each of the three bills of lading contains the following clause:



"Without prejudice to any other provision hereof it is hereby expressly agreed that all servants, agents and independent contractors including in particular, but not by way of limitation any stevedores used or employed by the Carrier for the purpose of or in connection with the performance of any of the Carriers obligations under the Bill of Lading shall in consideration of their agreement to be so used or employed have the benefit of all rights defences, exceptions from or limitations of liability or immunities of whatsoever nature referred to or incorporated herein applicable to the carrier or to which the Carrier is entitled hereunder so that in no circumstances shall any such servant, agent or independent contractor be under any liability greater than that of the carrier hereunder. It is hereby further expressly agreed that for the purpose of the foregoing provision the Carrier is or shall be deemed to be acting as agent or trustee on behalf and for the benefit of all persons who are or may be its servants, agents or independent contractors from time to time for the purpose of or in connection with the performance of any of Carriers obligations under this Bill of Lading, and that all such persons shall to this extent be or be deemed to be parties to the contract contained in or evidenced by this Bill of Lading."

It is settled law that parties may expand the coverage of the Carriage of Goods by Sea Act by the terms of a bill of lading. Secrest Machine Corp. v. S.S. Tiber, 450 F.2d 285 (5th Cir. 1971), and that a stevedore may assert the COGSA limitation where as here its liability is expressly limited by the bill of lading. The only interesting question is whether McRoberts, as an independent contractor of the stevedore, is also protected by the limitation. Clearly the employees and agents of the stevedore have such protection.

See Carle & Montanari, Inc. v. American Export Inbrandtsen Lines, Inc., 275 F. Supp. 76 (S.D.N.Y.) aff'd, 386 F.2d 839 (2d Cir. 1967), cert. denied, 390 U.S. 1013 (1969). And, by analogy, I would hold that McRoberts in this particular case, should also have the benefit of the limitation. See Sperry Rand Corporation v. Norddeutscher Lloyd, 1973 A.M.C. 2198 (S.D.N.Y. 1973).

In any event, the primary responsibility for the loss of the goods at issue lies with the carrier, Y.S. Lines. The bill of lading provides that the Hague Rules (COGSA) would be in effect:

"before the goods are loaded on and after they are discharged from the vessel and throughout the entire time the goods are in the custody of the Carrier."

The maritime contract continued even after the goods were unloaded on the pier.

As has been frequently and recently held, the contract continued to govern the relationship between the plaintiff and Lloyd [the shipper] after discharge but before delivery of [the goods] to plaintiff or its agent." Royal Typewriter Co. v. M.V. Kulmerland, 346 F. Supp. 1019, 1023 (S.D.N.Y. 1972), aff'd, 483 F.2d 645 (2d Cir. 1973).

The plaintiffs are therefore entitled to damages from the Tosahura Maru and Y.S. Lines but such damages are limited to \$500 per package. A more substantial question is presented by the claimover by Y.S. Lines against ITO and



McRoberts It is clear that except for the 1 carton not unloaded from the Tosahura Maru, the other 42 cartons were lost by the negligence of ITO or McRoberts. Each owed a duty of workmanlike performance of its contract to Y.S. Lines, Inc., although McRoberts' duty might be said to have been derivative in nature. The duty of workmanlike performance included the duty of reasonable care. Sperry Rand v. Norddeutscher Lloyd, supra. What constituted reasonable care under the circumstances is a question of fact which the precedents are of little help in determining. Here ITO had McRoberts guards at the most vulnerable places on the pier: the crib area, the bale area, the loading platforms and the gate; and a McRoberts guard was constantly on roving patrol during working hours. In non-working hours ITO had a McRoberts guard at the gate and one locked inside the shed on the pier. The ITO pier superintendent did not even have a key to the pier. It is difficult to imagine how much more ITO could have done to exercise reasonable care.

This is not a case such as Sperry Rand v. Norddeutscher Lloyd, supra, or Royal Typewriter Co. v. M.V. Kulmerland, supra, where it was clear that the stevedore and terminal operator did not employ sufficient guards. Here the number of guards was sufficient; it was the guarding that was deficient. It may well be that a barge or lighter tied up to

the pier one night and absconded with the goods in question such as McRoberts invites this Court to speculate. But this speculation is proof of nothing. Even in such an eventuality the McRoberts guard inside the pier shed should have noticed the 42 bales and cartons being taken from the pier.

Accordingly, I find that the claimover by Y.S. Lines against McRoberts is valid and the claimover against ITO must be dismissed.

But the claimover also includes a claim for attorneys fees and disbursements. In the absence of a specific statutory provision, such an award lies within the discretion of the Court. See Sprague v. Ticonic National Bank, 307 U.S. 161 (1939). Here the Y.S. Lines failed to promptly pay or tender to the plaintiffs that which was owed. Even the loss of the one carton which was admitted at trial was denied. I see no reason therefore to award attorneys fees and disbursements and that part of the demand is denied.

The plaintiffs and the third party plaintiff having been accorded all that is due to them, I find it unnecessary to discuss the other claims of the various parties.

Settle judgments on notice in accordance with this opinion.

/s/ Kevin Thomas Duffy  
U. S. D. J.

Dated: New York, New York  
August 7, 1974.

9a



PLAINTIFF'S EXHIBIT "A" - BILL OF LADING YN-134  
ISSUED BY Y.S. LINE DATED JUNE 30, 1970

E

VESSEL "Toyoharu Maru"		VOY. NO.
Port of Loading Yokohama, Japan	Port of Discharge New York	Final Destination
B/L No. (S/O No.) YN-134 (157)	SHIPPER Toyo Henka Kaisha, Ltd.	CONSIGNEE & NOTIFY PARTY to order  Toyomenka Inc., New York 2 Broadway New York N.Y. 10004

## BILL OF LADING



Y.S. LINE

(YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.)

Shipped on board the goods or packages said to contain goods hereinafter mentioned, in apparent good order and condition, unless otherwise indicated herein, to be transported subject to all the terms and conditions of this Bill of Lading, to the port of discharge named herein and/or such other port or place as authorized or permitted hereby or so near thereto as the vessel can always safely get and leave always afloat at all stages and conditions of water and weather, and there to be delivered or transhipped on payment of all charges thereon.

Weight, measure, marks, numbers, quality, contents and value if mentioned in this Bill of Lading are to be considered unknown unless the contrary has been expressly acknowledged and agreed to. The signing of this Bill of Lading is not to be considered as such an agreement.

DUPLICATE

MARKS AND NUMBERS	PACKAGES	DESCRIPTION	WEIGHT	MEASURE- MENT	REVENUE TON	RATE OF FREIGHT	FREIGHT	
							PREPAID	COLLECT
J D 2316 2677 NEW YORK C/NO. S3029 MADE IN JAPAN  TIM - 2289 - SK27001 NEW YORK C/NO. S3025-S3028  - 2289 - SK27001 C/NO. S3023-S3024  WILE - 2340 - SK27010	1 Carton Woolen Piece Goods 12 Cartons - do - 5 Cartons - do - 18 Cartons ***** Total: Eighteen (18) Cartons Only.	3,522 lbs. 127'-10"	3.2	\$60.50	\$193.60 *****			
NEW YORK C/NO. S3076-S3078, S3110-S3112, WILE - 2340 - SK27010 C/NO. S3127-S3129 FREIGHT PREPAID  -TIM - 2339 - SK27-50 C/NO. S3130-S3131								

(Particulars above furnished by Shipper)

Forwarding Agent: Daikichi  
Freight payable at: 006,4-5016,4-4800  
No. of original B(s)/L: Three (3)  
Dated at: JUN. 30. 1970  
On the: Ex. Rate Yen: 69,696.-  
#1

Accepting this Bill of Lading, the shipper, owner and consignee of the goods, and the holder of this Bill of Lading agree to be bound by all its stipulations, exceptions and conditions appearing on the face and back hereof, whether written, typed, stamped, printed or otherwise, as to the contrary. The undersigned, on behalf of Yamashita-Shinnihon Steamship Co., Ltd., the Master and the owner or the Vessel, hereby certify that the number of original Bills of Lading stated herein, all of this tenor and date, one of which being accomplished, the others being void. (Terms of Bill of Lading continued on back hereof)

YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.



is in the words "shipper" and "Carrier" above, intelligently whenever, wherever and however occurring and even in case of deviation or unworthiness of the vessel at the time of loading, inception of the voyage or unfitness of the cargo, shall be deemed to be a valid receipt for the goods as delivered by the shipper to the carrier.

- [illegible]

- [illegible]

## BILL OF LADIES

**COPY**  
NON-NEGOTIABLE



FORM NO. 201-BRN

NG



**Y.S. LINE**

(YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.)

7  
7

REVENUE TON	RATE OF FREIGHT	FREIGHT	
		PREPAID	COLLECT
2.7	\$60.50		\$163.35 *****
Ex. Rate		Yen:	

YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.

12 July 5

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

*Issued  
Summons*

TOYOMENKA, INC.

Plaintiff,

-against-

S.S. TOSAHARU MARU, and YAMASHITA-  
SHINNIHON STEAMSHIP CO., LTD.  
a/b/a Y.S. LINE,

Defendants,

71 Civil 656

YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.,

Third-Party Plaintiff,

-against-

INTERNATIONAL TERMINAL OPERATING CO., INC.  
and McROBERTS PROTECTIVE AGENCY, INC.

Third-Party Defendants.

AMENDED  
THIRD-PARTY  
COMPLAINT

FILED  
U.S. DISTRICT COURT  
JUL 6 2 20 PM '72  
S.D.C.N.Y.

82

Defendant - Third-party plaintiff, YAMASHITA-SHINNIHON STEAMSHIP CO., LTD., by its attorneys, KIRLIN, CAMPBELL & KEATING, complaining of the third-party defendants alleges on information and belief;

FIRST: At all times hereinafter mentioned third-party plaintiff, YAMASHITA-SHINNIHON STEAMSHIP CO., LTD., was and now is a corporation organized and existing under and by virtue of the laws of Japan with an office and place of business at in care of its agent at 21 West Street, City, County, and State of New York, and owned and operated the S.S. TOSAHARU MARU in the carriage of merchandise by water for hire.

SECOND: At all times hereinafter mentioned, third-party defendant, INTERNATIONAL TERMINAL OPERATING CO., INC., was and now is a corporation organized and existing under and by virtue of the laws of one of the states of the United States



and has an office and place of business at Two Broadway, New York, New York 10004.

THIRD: At all times hereinafter mentioned, third-party defendant, McRoberts Protective Agency, Inc., was and now is a corporation organized and existing under and by virtue of the laws of one of the states of the United States and has an office and place of business at 21 West Street, New York, New York.

FOURTH: On or about February 10, 1971, the plaintiff instituted a suit against third-party plaintiff in the United States District Court for the Southern District of New York, to recover damages in the total amount of \$35,000 plus interest, alleged to have been sustained by the plaintiff in connection with the non-delivery of cartons said to contain woolen piece goods which were carried by the third-party plaintiff on board its vessel the S.S. TOSAHARU MARU, from Yokohama to New York, and was discharged from the vessel in good order and condition and in proper quantity at Brooklyn, Pier 6, into the custody of the third-party defendant, INTERNATIONAL TERMINAL OPERATING CO., INC., between July 29 and July 31, 1971.

A copy of the summons and complaint is attached hereto as Exhibit A and a copy of third-party plaintiff's answer is annexed hereto as Exhibit B.

FIFTH: At all times material hereto the third-party plaintiff was a party to a written contract with third-party defendant, INTERNATIONAL TERMINAL OPERATING CO., INC., whereby the said third-party defendant agreed to provide terminal facilities, stevedoring and related terminal services to be performed at Pier 6, Brooklyn, for third-party plaintiff's vessels and cargoes discharged therefrom and said third-party defendant agreed to do all necessary and required work in connection with the discharging, storage and delivery of such cargoes, including those

mentioned in the complaint annexed hereto, and said third-party plaintiff agreed to pay, and did pay third-party defendant, INTERNATIONAL TERMINAL OPERATING CO., INC., for such services.

That as a stated and/or implied term of the aforementioned contract the said third-party defendant, INTERNATIONAL TERMINAL OPERATING CO., INC., warranted that it would perform all such services in a proper and workmanlike manner.

SIXTH: Third-party defendant, McROBERTS PROTECTIVE AGENCY, INC., was employed and engaged at Pier 6 to provide security and other watching services and to protect goods landed at Pier 6.

SEVENTH: That the said cartons, among others, were delivered into the custody of the third-party defendant, INTERNATIONAL TERMINAL OPERATING CO., INC., and said third-party defendant, INTERNATIONAL TERMINAL OPERATING CO., INC., received the cartons and agreed to store and deliver them in the same condition and number as received, to the parties entitled thereto.

EIGHTH: If there was any loss, damage or misdelivery to the goods referred to in the suit instituted by the plaintiff, such loss, damage or misdelivery occurred while the goods were in the custody, care and control of the said third-party defendants INTERNATIONAL TERMINAL OPERATING CO., INC., and McROBERTS PROTECTIVE AGENCY, INC., and any such loss or misdelivery as may have occurred was due solely to the negligence and carelessness of the third-party defendants, or those for whom they were responsible, in the care, custody and delivery of the said cartons, all in violation of and breach of the third-party defendants' contractual obligations to the third-party plaintiff, and in breach of their warranties to perform in a workmanlike manner, and as a result of third-party defendants' negligence. Any such loss or damage



as may have occurred was in no way caused or contributed to by any negligence of the third-party plaintiff.

NINTH: By reason of the premises, if there was any loss, damage or misdelivery to the cartons as alleged in the complaint, and if the third-party plaintiff is under any liability to the plaintiff for such loss, the third-party defendants are liable to the said third-party plaintiff for any and all amounts which may be adjudged as against the said third-party plaintiff, together with all costs and expenses, including attorneys fees, incurred by the third-party plaintiff in defending the action instituted against it.

WHEREFORE, defendant and third-party plaintiff, YAMASHITA-SHINNIHON STEAMSHIP CO., LTD., demands judgment dismissing the complaint, together with costs and disbursements or, in the event judgment is recovered against defendant and third-party plaintiff, YAMASHITA-SHINNIHON STEAMSHIP CO., LTD., that it have judgment over and against or be indemnified by INTERNATIONAL TERMINAL OPERATING CO., INC., and McROBERTS PROTECTIVE AGENCY, INC., together with costs, disbursements, counsel fees and other expenses incurred in the defense of the action, and that defendant and third-party plaintiff, YAMASHITA-SHINNIHON STEAMSHIP CO., LTD., have such other, further and different relief as the justice of the cause may require.

Dated: New York, New York  
June 23, 1972

KIRLIN, CAMPBELL & KEATING

BY: 

A Member of the Firm

Attorneys for Defendant and  
Third-Party Plaintiff

YAMASHITA-SHINNIHON STEAMSHIP  
CO., LTD.

120 Broadway

New York, New York 10005

(212) 732-5520

FILED  
U.S. DISTRICT COURT

**S.O. OF N.Y.**

TOYOMENKA, INC.,

Plaintiff,

- against -

S.S. TOSAHARU MARU, and YAMASHITA-  
SHINNIHON STEAMSHIP CO., LTD.  
d/b/a Y.S. LINE,

71 Civil 656

Defendants:

ANSWER TO AMENDED  
THIRD-PARTY COMPLAINT  
AND CROSS-CLAIM

YAMASHITA-SHINNIHON STEAMSHIP CO.,  
LTD.,

Third-Party Plaintiff,

- against -

INTERNATIONAL TERMINAL OPERATING CO.,  
INC., and McROBERTS PROTECTIVE AGENCY,  
INC.,

### Third-Party Defendants.

SECOND: Admits the allegations contained in paragraph "SECOND" of the amended third-party complaint but alleges that its principal place of business is at 17 Battery Place, New York, N.Y. and not 2 Broadway, New York, N.Y.

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17a



THIRD: Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph "THIRD" of the amended third-party complaint.

FOURTH: Denies the allegations contained in paragraph "FOURTH" of the amended third-party complaint except admits that a copy of the summons and complaint and third-party plaintiff's answer thereto are attached as exhibits.

FIFTH: Admits the existence of a written contract between third-party plaintiff and third-party defendant, INTERNATIONAL TERMINAL OPERATING CO., INC., but begs leave to refer to the terms and conditions of the contract at the trial of the action. Except as expressly so admitted, denies the allegations contained in paragraph "FIFTH" of the amended third-party complaint.

SIXTH: Admits the allegations contained in paragraph "SIXTH" of the amended third-party complaint.

SEVENTH: Denies the allegations contained in paragraph "SEVENTH" of the amended third-party complaint.

EIGHTH: Denies the allegations contained in paragraph "EIGHTH" of the amended third-party complaint.

NINTH: Denies the allegations contained in paragraph "NINTH" of the amended third-party complaint.

AS AND FOR A CROSS-CLAIM AGAINST  
THIRD-PARTY DEFENDANT McROBERTS  
PROTECTIVE AGENCY, INC., THIRD-  
PARTY DEFENDANT INTERNATIONAL  
TERMINAL OPERATING CO., INC.,  
ALLEGES AS FOLLOWS:

TENTH: That prior to July 1971, third-party defendant, McRoberts Protective Agency, Inc., was engaged by third-party defendant, INTERNATIONAL TERMINAL OPERATING CO., INC., to perform watching and security services at Pier 6, Brooklyn Port Authority pursuant to the terms of a contract.

ELEVENTH: That during July and August 1971, third-party defendant, McRoberts Protective Agency, Inc., was performing watching and security services at Pier 6, Brooklyn Port Authority pursuant to the aforesaid agreement.

TWELFTH: That any loss sustained to plaintiff's cargo as alleged in the complaint and amended third-party complaint was solely due to the negligence and breach of contractual obligations of third-party defendant, McRoberts Protective Agency, Inc., and was not due to negligence or breach of contractual obligations by third-party defendant, INTERNATIONAL TERMINAL OPERATING CO., INC.

THIRTEENTH: That by reason of the premises, third-party defendant, INTERNATIONAL TERMINAL OPERATING CO., INC., is entitled to recover from third-party defendant, McRoberts Protective Agency, Inc., any and all amounts it may be required to pay to plaintiff or third-party plaintiff and also the reasonable counsel fees and disbursements incurred in participating in this litigation.

WHEREFORE, third-party defendant, INTERNATIONAL TERMINAL OPERATING CO., INC., demands judgment dismissing the amended third-party complaint herein or in the alternative judgment over-against third-party defendant, McRoberts Protective Agency, Inc., for any amounts it may be required to pay to plaintiff or third-party



plaintiff together with reasonable counsel fees and disbursements incurred in participating in this litigation.

HILL, BETTS & NASH

By



A Member of the Firm

Attorneys for Third-Party  
Defendant and Cross-Claimant  
International Terminal Operating  
Co., Inc.  
No. 26 Broadway  
New York, N.Y. 10004  
269 - 2100

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

X

TOYOMENKA, INC.,

Plaintiff,

-against-

S.S. TOSAMARU MARU, and YAMASHITA-SHIMINIHON  
STEAMSHIP CO., LTD. d/b/a I.S. LINE,

Defendants.

-and-

YAMASHITA-SHIMINIHON STEAMSHIP CO., LTD.,

Third-Party Plaintiff,

-against-

INTERNATIONAL TERMINAL OPERATING CO., INC.,  
and McROBERTS PROTECTIVE AGENCY, INC.,

Third-Party Defendants.

X

Third-Party Defendant, McROBERTS PROTECTIVE AGENCY,  
INC., asnwering the cross complaint of the third-party defendant, INTER-  
NATIONAL OPERATING CO., INC., herein alleges upon information and belief:

FIRST: Denies each and every allegation contained  
in paragraphs "TENTH," and "ELEVENTH," of the cross complaint of the  
third-party defendant except that it is admitted that the third-party  
defendant McROBERTS PROTECTIVE AGENCY, INC. had a contract for service  
at Pier 6 in the Borough of Brooklyn and begs leave to refer to said  
contract at the time of the trial of this action.

SECOND: Denies each and every allegation contained  
in the paragraphs of the cross complaint designated: "TWELFTH," and  
"THIRTEENTH."

WHEREFORE, third-party defendant, McROBERTS PROTECT-  
IVE AGENCY, INC., demands judgment dismissing the cross complaint herein,  
with costs.

(13)

21a

*Robert Harris*  
J. ROBERT HARRIS  
Attorney for Third-Party  
Defendant  
McROBERTS PROTECTIVE AGENCY,  
INC.  
111 Fulton Street  
New York, New York 10038  
Tel. No. 732-4627

NOV 22 1972  
U.S. DISTRICT COURT  
S.D. OF N.Y.  
FILED  
656



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK \_\_\_\_\_ X

TOLOMENKA, INC.,

Plaintiff,

-against-

S.S. TOBARI MARU, and YAMASHITA-SHINNIHON  
STEAMSHIP CO., LTD. d/o/a Y.S. LINE,

Defendants.

71 Civil 656

-and-

YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.,

Third-Party Plaintiff,

-against-

INTERNATIONAL TERMINAL OPERATING CO., INC.  
and McROBERTS PROTECTIVE AGENCY, INC.,

Third-Party Defendants.

----- X

Third-Party Defendant, McROBERTS PROTECTIVE AGENCY,

INC., answering the amended third-party complaint of the defendant and  
third-party plaintiff, YAMASHITA-SHINNIHON STEAMSHIP CO., LTD., herein  
alleges upon information and belief:

FIRST: Denies any knowledge or information thereof  
sufficient to form a belief as to the truth of the allegations contained  
in the paragraphs of the amended third-party complaint designated:  
"FIRST," "SECOND," "FOURTH," "FIFTH," and "SEVENTH."

SECOND: Denies each and every allegation contained  
in the paragraph of the amended third-party complaint designated:  
"SIXTH," except that it is admitted that the third-party defendant,  
McROBERTS PROTECTIVE AGENCY, INC., was engaged to provide certain services  
at Pier 6 and third-party defendant begs leave to refer to said contract  
at the trial of this action.

THIRD: Denies each and every allegation contained  
in the paragraphs of the amended third-party complaint designated:  
"EIGHTH," and "NINTH."

AS AND FOR A CROSS COMPLAINT AGAINST  
THE THIRD-PARTY DEFENDANT INTERNATIONAL  
TERMINAL OPERATING CO., INC. THE THIRD-  
PARTY DEFENDANT McROBERTS PROTECTIVE  
AGENCY, INC. RESPECTFULLY ALLEGES HEREIN  
UPON INFORMATION AND BELIEF:

FOURTH: That at all times hereinafter mentioned

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third-party defendant, INTERNATIONAL TERMINAL OPERATING CO., INC., was and still is a Delaware corporation with an office at 17 Battery Place, in the Borough of Manhattan, City and State of New York.

FIFTH: That at all the times hereinafter mentioned the third-party defendant, McROBERTS PROTECTIVE AGENCY, INC., was and still is a domestic corporation with its principal place of business at 21 West Street, in the Borough of Manhattan, City and State of New York.

SIXTH: That at the time and place mentioned in the amended third-party complaint and the other pleadings served herein the third-party defendant, INTERNATIONAL TERMINAL OPERATING CO., INC., by a written contract with the third-party plaintiff was engaged in discharging the cargo from the S.S. TOSAHARU MARU on Pier 6 in the Borough of Brooklyn.

SEVENTH: That the said cargo being discharged was in the care, custody and control of the said INTERNATIONAL TERMINAL OPERATING CO., INC., and the particulars cargo which it is alleged was lost, damaged or misdelivered was never in the control or custody of the third-party defendant, McROBERTS PROTECTIVE AGENCY, INC., <sup>but</sup> or solely under control and direction of the third-party defendant INTERNATIONAL TERMINAL OPERATING CO., INC.,

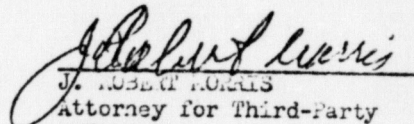
EIGHTH: That if the plaintiff or third-party plaintiff is entitled to recover damages for the alleged loss of cargo then such loss would have been brought about by the negligence or the breach of contractual obligations on the part of the INTERNATIONAL TERMINAL OPERATING CO., INC., in the performance of its duties at Pier 6, Borough of Brooklyn and not by any negligence or breach of contract on the part of the third-party defendant, McROBERTS PROTECTIVE AGENCY, INC.

NINTH: That by reason of the foregoing the third-party defendant McROBERTS PROTECTIVE AGENCY, INC., is entitled to recover to the third-party defendant INTERNATIONAL TERMINAL OPERATING CO., INC., in and all amounts he may require to pay to the plaintiff or third-party plaintiff and also counsel fees, costs and disbursements expended in the defense of this action.

WHEREFORE, the third-party defendant, McROBERTS PROTECTIVE AGENCY, INC., demands judgment dismissing the <sup>amended</sup> third-party



complaint herein and further demands judgment in the event of any recovery against it over and against the third-party defendant INTERNATIONAL TERMINAL OPERATING CO., INC., for any amount it may be required to expend together with the costs, fees and disbursements incurred in the defense of this action.

  
J. ROBERT MORRIS  
Attorney for Third-Party  
Defendant  
McROBERTS PROTECTIVE AGENCY,  
INC.  
111 Fulton Street  
Borough of Manhattan  
City of New York 10038  
Tel. No. 732-5627

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
MARUBENI-IIDA (AMERICA) INC. and MURILSPUN LTD.,

Plaintiffs,

-against-

SS TOSAHARU MARU, her engines, etc., YAMASHITA-SHINNIHON KISEN K.K., YAMASHITA-SHINNIHON STEAMSHIP CO., LTD. and TEXAS TRANSPORT & TERMINAL CO., INC.,

Defendants.  
-----x

YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.,

Third Party Plaintiff,

-against-

INTERNATIONAL TERMINAL OPERATING CO., INC., and  
McROBERTS PROTECTIVE AGENCY, INC.,

Third Party Defendants.  
-----x

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U.S. DISTRICT COURT  
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Third party defendant, McROBERTS PROTECTIVE AGENCY, INC., answering the third party cross-complaint of the third party defendant, INTERNATIONAL TERMINAL OPERATING CO., INC., herein upon information and belief:

FIRST: Denies the allegations contained in the paragraphs of the cross-complaint designated: "TENTH" & "ELEVENTH" except that it is admitted that the third party defendant, McROBERTS PROTECTIVE AGENCY, INC., had a contract for services on pier 6 in the Borough of Brooklyn, and denies leave to refer to said contract at the time of the trial of this action.

SECOND: Denies the allegations contained in the paragraphs of the cross-complaint designated: "TWELFTH" & "THIRTEENTH."

WHEREFORE, defendant, McROBERTS PROTECTIVE AGENCY, INC., demands judgment dismissing the cross-complaint herein, with costs.

(17)

*Robert Morris*  
ROBERT MORRIS  
Attorney for Third Party Defendant  
McROBERTS PROTECTIVE AGENCY, INC.  
111 Fulton Street  
New York, New York, 10038



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
MARUBENI-IIDA (AMERICA) INC. and MARILSPUN LTD.

Plaintiffs,

-against-

SS TOSAHRU MARU, her engines, etc., YAMASHITA-  
SHINNIHON KISEN K.K., YAMASHITA-SHINNIHON  
STEAMSHIP CO., LTD. and TEXAS TRANSPORT &  
TERMINAL CO., INC.,

Defendants,

-----x  
YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.,

Third Party Plaintiff,

-against-

INTERNATIONAL TERMINAL OPERATING CO., INC. and  
McROBERTS PROTECTIVE AGENCY, INC.,

Third Party Defendants.  
-----x

FILED  
U.S. DISTRICT COURT  
S.D. OF N.Y.  
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Third Party Defendant, McROBERTS PROTECTIVE AGENCY, INC., answering the third party complaint of the third party plaintiff, YAMASHITA-SHINNIHON STEAMSHIP CO., LTD., herein upon information and belief:

FIRST: Denies any knowledge or information thereof sufficient to form a belief as to the truth of the allegations contained in the paragraphs of the third party complaint designated: "FIRST," "SECOND," "FOURTH," "FIFTH" & "SEVENTH."

SECOND: Denies the allegations contained in the paragraphs of the complaint designated: "SIXTH" except that it is admitted the third party defendant, McROBERTS PROTECTIVE AGENCY, INC., was engaged to provide certain services on pier 6, and this third party defendant begs leave to refer to said contract at the time of the trial of this action.

THIRD: Denies the allegations contained in the paragraphs of the third party complaint designated: "EIGHTH" & "NINTH."

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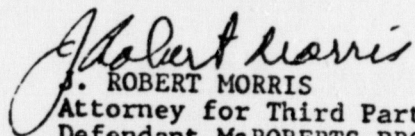
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AS AND FOR A CROSS COMPLAINT AGAINST  
THE THIRD PARTY DEFENDANT, INTERNATIONAL  
TERMINAL OPERATING CO., INC., THE THIRD  
PARTY DEFENDANT, McROBERTS PROTECTIVE  
AGENCY, INC., RESPECTFULLY ALLEGES:

FOURTH: That if the plaintiffs were caused to sustain damages at the time and place set forth in the plaintiffs' complaint through any carelessness, recklessness and/or negligence other than the plaintiffs' own negligence, carelessness and recklessness, said damages were sustained by reason of the primary carelessness, recklessness and negligence and/or affirmative acts of omission or commission by the third party defendant, INTERNATIONAL TERMINAL OPERATING CO., INC., its or their agents, servants and/or employees, with the negligence if any on the part of this answering third party defendant being secondary and/or derivative only.

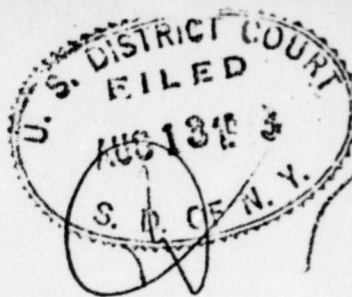
FIFTH: That by reason of the foregoing, the third party defendant, INTERNATIONAL TERMINAL OPERATING CO., INC., will be liable to this answering third party defendant in the event and in the amount of recovery herein by the plaintiffs or in such amount as the Court or Jury may direct.

WHEREFORE, the third party defendant, McROBERTS PROTECTIVE AGENCY, INC., demands a judgment dismissing the complaint herein as to this answering third party defendant and further demands judgment over and against the third party defendant, INTERNATIONAL TERMINAL OPERATING CO., INC., for the amount of any judgment which may be obtained herein by the plaintiffs against this answering third party defendant, or in such amount as the Court or Jury may direct together with the costs and disbursements of the action.

  
J. ROBERT MORRIS  
Attorney for Third Party  
Defendant McROBERTS PRO-  
TECTIVE AGENCY, INC.  
111 Fulton Street  
New York, New York, 10038



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



-----X  
TOYOMENKA, INC.,

Plaintiff,

- against -

S.S. "TOSAHARU MARU", her engines,  
boilers, etc.,

- and against -

YAMASHITA-SHINNIHON STEAMSHIP  
CO., LTD. d/b/a Y.S. LINE,

Defendant & Third  
Party Plaintiff,

- against -

INTERNATIONAL TERMINAL OPERATING  
CO., INC. and McROBERTS PROTECTIVE  
AGENCY, INC.,

Third Party  
Defendants.

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-----X  
PRE-TRIAL ORDER

MARUBENI-IIDA (AMERICA), INC. and  
MURILSPUN LTD.,

Plaintiffs,

- against -

S.S. "TOSAHARU MARU", her engines,  
boilers, etc.

- and against -

YAMASHITA-SHINNIHON KISEN K.K.,  
YAMASHITA-SHINNIHON STEAMSHIP CO.,  
LTD. and TEXAS TRANSPORT & TERMINAL  
CO., INC.,

Defendants,

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- and -

YAMASHITA-SHINNIHON STEAMSHIP CO., LTD. :

Third Party :  
Plaintiff :

- against - :

INTERNATIONAL TERMINAL OPERATING :  
CO., INC., and McROBERTS PROTECTIVE :  
AGENCY, INC., :

Third Party :  
Defendants. :

-----X

On June 5, 1973 the parties to this action or their attorneys appeared before the Court at a pre-trial conference, pursuant to local Calendar Rules 6 and 13 and Rule 16 of the Federal Rules of Civil Procedure, and at subsequent meetings among counsel, the following action was taken:

1. The pleadings were agreed to be deemed amended in accordance with the framing of the issues of this action in paragraph 7 of this pre-trial order, and further amended to include the third party defendants International Terminal Operating Co., Inc. and McRoberts Protective Agency, Inc. as parties defendant of the plaintiffs Toyomenka, Inc., Marubeni-Iida (America), Inc. and Murilspun, Ltd. in their respective actions.



2. The parties agree that the trial of this action shall be based upon this order and upon the pleadings as amended.

3. (a) The parties stipulated that the following facts are not in dispute in this action (each party reserving the right to object to the materiality of any such stipulated fact and its relevancy to the issues):

(1) The jurisdiction of this Honorable Court.

(2) The defendant Yamashita-Shinnihon Steamship Co., Ltd., doing business as and hereinafter referred to as, Y.S. Line, in June, July and August of 1970 was engaged in the business as an ocean carrier of merchandise for hire.

(3) Yamashita-Shinnihon Kisen K.K. was the owner of the vessel S.S. "TOSAHARU MARU" and Yamashita-Shinnihon Steamship Co., Ltd. was the operator of the vessel S.S. "TOSAHARU MARU" in June, July and August of 1970.

(4) That on or about June 30, 1970 at Yokohama, Japan, there were delivered to the defendant Y.S. Line and the S.S. "TOSAHARU MARU" two shipments of woolen piece goods totaling 32 cartons, more particularly described on Bills of Lading YN-133, 14 cartons, and YN-134, 18 cartons, for carriage to the Port of New York, for delivery to the order of plaintiff, Toyomenka, Inc. and further on or about June

26, 1970 at Kobe there was delivered to the defendant Y.S. Line and the S.S. "TOSAHARU MARU" a shipment consisting of 16 bales woolen piece goods more particularly described on Bill of Lading KN-99 dated June 26, 1970, 16 bales of woolen piece goods for carriage to New York to the order of Murilspun, Ltd.

(5) That Y.S. Line issued the three bills of lading covering the shipments described in paragraph 4 hereof in the ordinary course of business.

(6) That the defendant International Terminal Operating Co., Inc., hereinafter referred to as I.T.O., was and still is engaged in the business of discharging and loading cargo and the storing of such cargo at its pier and shed facility until delivery of same is made to the proper parties.

(7) That I.T.O. performed the aforesaid functions for Y.S. Line pursuant to a contract between the two parties.

(8) That the defendant McRoberts Protective Agency, Inc., hereinafter referred to as McRoberts, is engaged, among other things, in providing pier security at Pier 6, Brooklyn, and performed such duties pursuant to contract between it and I.T.O.

(9) That on or about July 27, 1970, the S.S. "TOSAHARU MARU" docked at Pier 6, Brooklyn.



(10) In August, 1970, plaintiffs, through their agents attempted to pick up the shipments called for on bills of lading YN-133, YN-134 and KN-99, but delivery was made of only two cartons out of 14 on bill of lading YN-133, only two cartons out of 18 on bill of lading YN-134 and one bale out of 16 bales out of bill of lading KN-99.

(11) To date, the 43 missing cartons and bales from the three bills of lading have not been received by plaintiffs although duly demanded.

(12) That the shipments herein moved subject to the United States Carriage of Goods by Sea Act.

(13) It is stipulated that the value of the goods not delivered herein which are the subject matter of this suit are as follows:

(a) Plaintiff Toyomenka, Inc.'s damages are the following:

NON DELIVERY

Ex B/L YN-133 (156)

12 cartons woolen piece goods	\$7,688.16
Freight	136.00
Duty	<u>3,856.59</u>

\$11,680.75

Ex B/L YN-134 (157)

16 cartons woolen piece goods	\$11,595.25
Duty	<u>5,565.72</u>

\$17,160.97

\$28,841.72

plus interest and costs, including the proving of facts not admitted in the Request to Admit, including reasonable attorneys fees, plus interest and costs.

(b) Plaintiffs Marubeni-Iida (America), Inc. and Murilspun, Ltd.'s damages are the following:

NON DELIVERY

Ex B/L KN-99

1 bale #513	327.5 yards at \$2.14/yard CIF	\$700.85	
	Duty	<u>313.63</u>	
			\$1,014.48
5 bales	"	\$5,024.49	
	"	<u>2,248.51</u>	
			7,273.00
2 bales	"	\$2,084.11	
	"	<u>932.66</u>	
			3,016.77
2 bales	"	\$1,511.25	
	"	<u>676.30</u>	
			2,187.55
5 bales	"	\$4,710.37	
	"	<u>2,107.94</u>	
			<u>6,818.31</u>
			\$20,310.11

plus interest and costs, including the proving of facts not admitted in the Request to Admit, including reasonable attorneys fees, plus interest and costs.

3(b). It is the plaintiffs' contentions that the 18 cartons on bill of lading YN-134, 14 cartons on bill of lading YN-133 and 16 bales of woolen piece goods on bill of lading KN-99 were delivered to the defendant Y.S. Line and the vessel S.S. "TOSAHARU MARU" complete and in good



order and condition and that when delivery was called for by the plaintiffs, Y.S. Line breached its contract of carriage to the plaintiffs in that it failed to make delivery of the complete shipments, but rather delivered only 2 cartons out of 14 on bill of lading YN-133, only 2 cartons out of 18 on bill of lading YN-134 and 1 bale out of 16 bales on bill of lading KN-99.

It is the plaintiffs further contention that if this Honorable Court deems that the loss of the aforesaid cartons and bales was due to the negligence of defendant McRoberts, that said defendant is not entitled to the limitation of liability of \$500.00 per package provided for in the Y.S. Line bill of lading.

3(c) (1) It is defendant Y.S. Line's contention that:

(a) The pre-trial testimony and delivery records establish that all of the cartons on bills of lading YN-133 and YN-134 and all but one bale on bill of lading KN-99 were discharged by I.T.O. from the vessel to the Pier.

(b) Liability of Y.S. Line herein is limited to \$500.00 per package/bale.

(c) Delivery of the plaintiffs' shipments was constructively made by Y.S. Line.

(d) If plaintiffs sustained any losses herein, same were the result of the negligence and breach of contract of the third party defendants, I.T.O. and McRoberts, and Y.S. Line is entitled to complete indemnity including counsel fees and expenses from I.T.O.

(2) It is the contention of defendant I.T.O. that the sole cause of the loss of the cartons and bales which are the subject of this consolidated action was the negligence and breach of contractual obligations of third-party defendant, McRoberts Protective Agency, Inc., in performing the security services for which they had been engaged to perform at Pier 6, Brooklyn Port Authority.

Third-party defendant, I.T.O., further contends that it did not commit any acts of negligence or any breach of contractual obligations owed to any party to this litigation in the performance of its duties at Pier 6, Brooklyn Port Authority.

(3) It is the contention of defendant McRoberts that it denies any custody or control, and further alleges that it was not careless or negligent in any manner or way, or breached any contract or agreement and that it was responsible in any way for the alleged loss of the goods as claimed by the plaintiffs. Nor does it concede that the plaintiffs were damaged in the amount claimed.

Furthermore, the third-party defendant asserts that



if there was any loss or mis-delivery of the goods after they passed out of the hands of the shippers, and it is adjudged that this loss occurred through the fault of the third-party defendants, then such loss or mis-delivery was the fault of the third-party defendant, International Terminal Operating Co., Inc., through their carelessness, negligence or breach of contractual duty towards the plaintiffs without fault on the part of McRoberts and the latter is entitled to claim over against them in such amount.

McRoberts further contends that it fulfilled all the terms of its agreement with I.T.O., the substance of which it wishes refers to at the time of trial.

4(a). The exhibits which each party now expects to offer at trial are those identified herein. Should any party hereafter decide to offer additional exhibits, prompt notice of that fact shall be given to each other party and to the Court by serving and filing a supplemental pre-trial order.

(b) The exhibits plaintiffs, TOYOMENKA, INC. and MARUBENI-IIDA (AMERICA), INC. and MURILSPUN, LTD. intend to offer into evidence at the time of trial are the following:

- (1) Bills of lading covering all shipments herein.
- (2) Commercial invoices and packing lists.
- (3) Mate's receipt.

- (4) Logs.
- (5) Delivery receipts.
- (6) I.T.O.'s report of cargo non-landed dated July 29, 1970.
- (7) I.T.C.'s damage report dated August 5, 1970 (both sides).
- (8) I.T.O.'s sorting book.
- (9) I.T.O.'s missing cargo report.
- (10) Security Bureau report.
- (11) Depositions of Y.S. Line, I.T.O. and McRoberts.

(c) The exhibits defendant Yamashita-Shinnihon Steamship Co., Ltd. intends to offer into evidence at the time of trial are the following:

(d) The exhibits third party defendant International Terminal Operating Co., Inc. intends to offer into evidence at the time of trial are the following:

I.T.O. does not intend to offer any exhibits at the trial at this time, but reserves its right to do so depending upon developments at the time of trial.

(e) The exhibits third party defendant McRoberts Protective Agency, Inc. intends to offer into evidence



at the time of trial are the following:

Records and documents of McRoberts pertaining to storage of goods and presence of personnel.

5. The witnesses all parties intend to call are listed herein. Should any party decide to call any additional witnesses, prompt notice of their identity shall be given to each other party and to the Court. The party shall set forth the reason why the witness was not previously identified.

(a) Plaintiff Toyomenka, Inc., intends to call as its witness:

John Quirolo

(b) Plaintiffs Marubeni and Murilspun intend to call as their witness:

An officer.

(c) Defendant Yamashita-Shinnihon Steamship Co., Ltd. intends to call as its witnesses:

(d) Third Party Defendant, I.T.O. intends to call as its witness:

George Markwalter

(e) Third Party Defendant, McRoberts intends

to call as its witnesses:

William J. McRoberts

Robert Bell

6. The parties also agreed on the following matters:

(a) Plaintiffs Toyomenka, Marubeni and Murilspun at this time expect to require a total of one-half trial day.

(b) Defendant Y.S. Line at this time expects to require one-half trial day.

(c) Defendant I.T.O. at this time expects to require one trial day.

(d) Third party defendant McRoberts at this time expects to require one trial day.

7. The issues to be tried by this Court are as follows:

(a) Based on depositions taken heretofore of the party defendants and records, the defendant Y.S. Line received the entire contents of the three bills of lading and defendants failed to deliver the aforesaid portions claimed herein; however, if it is found that the loss was the result of the negligence of third party defendant McRoberts Protective Agency, Inc., whether the \$500.00 per package limitation is available to said defendant.

(b) Whether any negligence and breach of contractual obligations defendant International Terminal



Operating Company, Inc. had with defendant Y.S. Line was a proximate cause of the loss of the cartons and bales herein.

(c) Whether any negligence and breach of contractual obligations defendant McRoberts Protective Agency Inc. had with defendant International Terminal Operating Company, Inc. was a proximate cause of the loss of the cartons and bales herein.

(d) Whether any negligence and breach of contractual obligations defendant International Terminal Operating Company, Inc. had with defendant McRoberts Protective Agency, Inc. was a proximate cause of the loss of the cartons and bales herein.

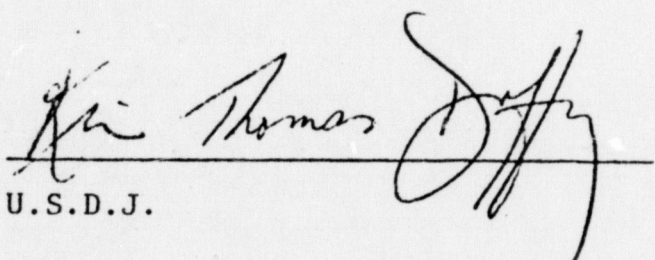
(e) Whether this Honorable Court has subject matter jurisdiction in the direct action based on negligence as amended by this Order, between the plaintiffs herein and McRoberts.

(f) Whether the statute of limitations has run viz-a-viz the plaintiffs herein as against the defendant and third party defendant McRoberts.

(g) Whether I.T.O. is entitled to the benefit of the \$500.00 per package limitation pursuant

to the terms and conditions of the contracts of carriage.

SO ORDERED:

  
U.S.D.J.

CONSENTED TO:

VINCENT, BERG & RUSSO

By: Vincent Berg & Russo  
Attorneys for Plaintiff,  
TOYOMENKA, INC.

HILL, RIVKINS, McGOWAN & CAREY

By: Thos. Rivkins McGowan, Carey  
Attorneys for Plaintiffs,  
MARUBENI-IIDA (AMERICA), INC. and  
MURILSPUN LTD.

KIRLIN, CAMPBELL & KEATING

By: Charles Campbell & Keating  
Paul H. Bruner  
Attorneys for Defendant,  
YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.

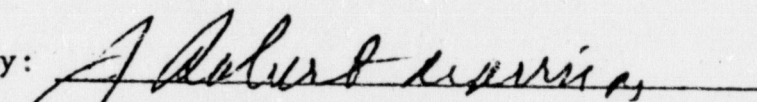
HILL, BETTS & NASH

By: Robert H. Betts  
Attorneys for Defendant,  
INTERNATIONAL TERMINAL OPERATING CO., INC.



J. ROBERT MORRIS

By:



Attorneys for Defendant,  
McROBERTS PROTECTIVE AGENCY, INC.

5.00pd

9.23.1974

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

-----X  
TOYOMENKA, INC.,

Plaintiff,

: ~~71 Civ. 656 KTD~~

-against-

S.S. "TOSAHARU MARU", her engines,  
boilers, etc.,

-and against-

YAMASHITA-SHINNIHON STEAMSHIP CO.,  
LTD., d/b/a Y.S. LINE,

Defendant and  
Third-Party Plaintiff,

-against-

INTERNATIONAL TERMINAL OPERATING  
CO. INC., and McROBERTS PROTECTIVE  
AGENCY, INC.,

Third-Party Defendants.  
-----X

MARUBENI-IIDA (AMERICA), INC., and  
MURILSPUN LTD.,

Plaintiffs

: 71 Civ. 1351 KTD

-against-

S.S. "TOSAHARU MARU", her engines,  
boilers, etc.,

-and against-

YAMASHITA-SHINNIHON KISEN K.K.,  
YAMASHITA-SHINNIHON STEAMSHIP CO.,  
LTD. and TEXAS TRANSPORT & TERMINAL  
CO., INC.,

Defendants,

: NOTICE OF APPEAL

-and-

YAMASHITA-SHINNIHON-STEAMSHIP CO., LTD.,

Third-Party Plaintiff,

-against-

INTERNATIONAL TERMINAL OPERATING  
CO. INC., and McROBERTS PROTECTIVE  
AGENCY, INC.,

Third-Party Defendants.  
-----X

FILED  
U.S. DISTRICT COURT  
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S.D. OF N.Y.

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Notice is hereby given that TOYOMENKA, INC.,  
MARUBENI-IIDA (AMERICA), INC. and MURILSPUN LTD.,  
plaintiffs above named, hereby appeal to the United States  
Court of Appeals for the Second Circuit from the final  
judgment of the Honorable Kevin Thomas Duffy, United  
States District Judge entered in this action on the  
3rd day of September, 1974.

September 16, 1974

VINCENT BERG & RUSSO

by 

Attorneys for Plaintiff,  
TOYOMENKA, INC.  
127 John Street  
New York, New York 10038

HILL, RIVKINS, CAREY, LOESBERG  
& O'BRIEN

by 

Attorneys for Plaintiffs,  
MARUBENI-IIDA (AMERICA) INC. and  
MURILSPUN, LTD.  
96 Fulton Street  
New York, New York 10038

TO:

MESSRS. KIRLIN, CAMPBELL & KEATING  
Attorneys for Defendant and  
Third-Party Plaintiff  
YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.  
120 Broadway, New York, New York 10005

MESSRS. HILL, BETTS & NASH  
Attorneys for Third-Party Defendant  
INTERNATIONAL TERMINAL OPERATING CO. INC.  
One World Trade Center, New York, New York 10048

J. ROBERT MORRIS, ESQ.  
Attorney for Third-Party Defendant  
McROBERTS PROTECTIVE AGENCY, INC.  
111 Fulton Street, New York, New York 10038

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

NO. 8  
Oct 8 3 19 PM '74  
S.D. OF N.Y.

-----x  
TOYOMENKA, INC.,  
Plaintiff,

-against-

S.S. "TOSAHARU MARU", her engines, boilers,  
etc.,

-and against-

YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.,  
d/b/a Y.S. LINE,

Defendant & Third-Party Plaintiff,

-against-

INTERNATIONAL TERMINAL OPERATING CO. INC., and  
McROBERTS PROTECTIVE AGENCY, INC.,

Third-Party Defendants.

NOTICE OF CROSS-  
APPEAL

71 Civ. 656 (KTD)  
#5

-----x  
MARUBENI-IIDA (AMERICA), INC., and MURILSPUN  
LTD.,

Plaintiff,

-against-

S.S. "TOSAHARU MARU", her engines, boilers  
etc.,

-and against-

YAMASHITA-SHINNIHON KISEN K.K., YAMASHITA-  
SHINNIHON STEAMSHIP CO., LTD. and TEXAS  
TRANSPORT & TERMINAL CO., INC.,

Defendants.

-and-

YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.,

Third-Party Plaintiff,

-against-

INTERNATIONAL TERMINAL OPERATING CO., INC.,  
and McROBERTS PROTECTIVE AGENCY, INC.,

Third-Party Defendants.

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Consolidated  
for all  
purposes  
under 71 Civ.  
656

10 day  
instruction  
to day letter



Notice is hereby given that YAMASHITA-SHINNIHON STEAMSHIP CO., LTD., the defendant and third-party plaintiff above named, hereby cross-appeals to the United States Court of Appeals for the Second Circuit from so much of the final judgment of the Honorable Kevin Thomas Duffy, United States District Judge, entered in this action on the 3rd day of September 1974 which as stated in the opinion upon which said judgment is based denied the portion of the claim of the said defendant and third-party plaintiff for indemnity damages constituting its expenditures of counsel fees and disbursements in defense of the action and which, upon reconsideration reaffirmed the original decision denying such portion of its claim order entered September 11, 1974.

Dated: New York, New York, October 8, 1974

TO:


VINCENT BERG & RUSSO, ESQS.  
Attorneys for Plaintiff  
TOYOMENKA, INC.  
127 John Street  
New York, New York 10038

HILL, RIVKINS, CAREY,  
LOESBERG & O'BRIEN, ESQS.  
Attorneys for Plaintiffs  
MARUBENI-IIDA (AMERICA)  
INC. and MURILSPUN, LTD.  
96 Fulton Street  
New York, New York 10038

J. ROBERT MORRIS  
Attorneys for Defendant & Third-  
Party Defendant  
McROBERTS PROTECTIVE AGENCY  
111 Fulton Street  
New York, New York 10038

HILL, BETTS & NASH, ESQS.  
Attorneys for Third-Party Defendant  
INTERNATIONAL TERMINAL OPERATING CO., INC.  
One World Trade Center  
New York, New York 10048

KIRLIN, CAMPBELL & KEATING

  
Attorneys for Cross-Appellant  
YAMASHITA-SHINNIHON STEAMSHIP  
CO., LTD.  
120 Broadway  
New York, New York 10005

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

TOYOMENKA, INC.,

Plaintiff,

-against-

S.S. "TOSAHARU MARU", her engines,  
boilers, etc.,

-and against-

YAMASHITA-SHINNIHON STEAMSHIP  
CO., LTD. d/b/a Y.S. LINE,

Defendant & Third-  
Party Plaintiff,

-against-

INTERNATIONAL TERMINAL OPERATING  
CO., INC. and McROBERTS PROTECTIVE  
AGENCY, INC.,

Third-Party  
Defendants.

MARUBENI-IIDA (AMERICA), INC. and  
MURILSPUN LTD.,

Plaintiffs,

-against-

S.S. "TOSAHARU MARU", her engines,  
boilers, etc.,

-and against-

YAMASHITA-SHINNIHON KISEN K.K.  
YAMASHITA-SHINNIHON STEAMSHIP CO.,  
LTD. and TEXAS TRANSPORT & TERMINAL  
CO., INC.,

Defendants,

-and-

YAMASHITA-SHINNIHON STEAMSHIP CO.,  
LTD.,

Third-Party  
Plaintiff,

-against-

INTERNATIONAL TERMINAL OPERATING  
CO., INC. and McROBERTS PROTECTIVE  
AGENCY, INC.,

Third-Party  
Defendants.

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N.A.

71 Civ. 656 KTD

NOTICE OF  
CROSS-APPEAL

(38)

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Notice is hereby given that International Terminal Operating Co., Inc., third-party defendant in the above entitled actions, hereby cross-appeals to the United States Court of Appeals for the Second Circuit from that part of the final judgment of the Honorable Kevin Thomas Duffy, United States District Judge, entered September 3, 1974 and Judge Duffy's reaffirmance of his decision on reconsideration entered September 11, 1974 which denied counsel fees in favor of International Terminal Operating Co., Inc. as against co-third-party defendant, McRoberts Protective Agency, Inc.

Dated: New York, New York  
October 9, 1974

HILL, BETTS & NASH

By 

A Member of the Firm

Attorneys for Cross-Appellant,  
International Terminal Operating  
Co., Inc.

Office & P.O. Address  
One World Trade Center  
Suite 5215

New York, New York 10048

TO:

J. ROBERT MORRIS, ESQ.  
Attorney for Third-Party Defendant,  
McRobert Protective Agency, Inc.  
111 Fulton Street  
New York, New York 10038

VINCENT, BERG & RUSSO  
Attorneys for Plaintiff,  
Toyomenka, Inc.  
127 John Street  
New York, New York 10038

HILL, RIVKINS, CAREY, LOESBERG & O'BRIEN  
Attorneys for Plaintiffs,  
Marubeni-Iida (America), Inc.  
and Murilspun Ltd.  
96 Fulton Street  
New York, New York 10038

KIRLIN, CAMPBELL & KEATING  
Attorneys for Defendant and  
Third-Party Plaintiff,  
Yamashita-Shinnihon Steamship Co., Ltd.  
120 Broadway  
New York, New York 10005

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DEC 18 1974

**HILL, BETTS & NASH**

**COPY RECEIVED**

DEC 18 1974

**KIRLIN, CAMPBELL & KEATING**

**COPY RECEIVED**

DEC 18 1974

**HILL, RIVKINS, CAREY, LOESBERG & O'BRIEN**

*Copy received  
Dec 18, 1974  
J Robert Morris  
Attorney for (Re)  
3rd party def-  
endant  
Re Potatoes*



